IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1233

NATIONAL LABOR RELATIONS BOARD and
PETER G. NASH, GENERAL COUNSEL,

Petitioners,

—v.—

SEARS, ROEBUCK AND COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AND CONSUMERS UNION OF UNITED STATES, INC. *AMICI CURIAE*

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INTEREST OF AMICI[1/]

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 250,000 members dedicated solely to the preservation of the liberties safeguarded by the Bill of Rights. During its fifty-four year existence the ACLU has been particularly concerned with the freedoms protected by the First Amendment to the Constitution, and in recent years it has represented numerous citizens requesting disclosure of information from executive agencies of the Government under the Freedom of Information Act.

Consumers Union of United States, Inc. ("Consumers Union") is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports (magazine and TV) and other publications. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with its 2.2 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

1/ Letters from both of the parties, consenting to the submission of this brief, have been filed with the Clerk.

In connection with its product testing, publishing, and other activities, Consumers Union frequently requests information from government agencies. The first lawsuit under the Freedom of Information Act was brought by Consumers Union to obtain hearing aid test data and scoring methodologies from the Veterans Administration. Consumers Union v. Veterans Administration, 301 F.Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d. Cir. 1971). Soon thereafter, Consumers Union made a particularly helpful contribution as amicus curiae in a FOIA appeal brought by the National Labor Relations Board. See, Getman v. N.L.R.B., 450 F.2d 670, 673, n.25 (D.C.Cir. 1971).

The public's right to know the bases and criteria for decisions made by government agencies is inherent in our system of government. The Freedom of Information Act was passed by Congress to ensure that the public would be able to know how executive agencies were discharging their functions. Amici Curiae believe that this case and its companion, Renegotiation Board v. Grumman Aircraft Engineering Corporation, No. 73-1316, present important questions concerning the reach of the Act to prevent the development of "secret law" by administrative agencies.

STATUTE INVOLVED

The provisions of the Freedom of Information Act, 5 U.S.C. §552, are reproduced at pp. 53-56 of the appendix to petitioners' brief.

QUESTION PRESENTED

Whether the Freedom of Information Act requires disclosure of the General

Counsel's final opinions in advice and appeals cases.

DECISIONS BELOW

The instant FOIA litigation arose out of an unfair labor practice charge filed by Sears which generated both an advice memorandum ordering dismissal of the charge, and an appeals memorandum reversing the latter and ordering the Regional Director to issue a complaint.[2] During the administrative

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2/All charges under the National Labor Relations Act (29 U.S.C. §151, et seq.) are filed with one of the Board's 31 Regional Directors to whom the General Counsel has delegated his authority to decide whether complaints shall issue. However, to insure a uniform prosecutorial policy, all unfair labor practice charges presenting novel legal or policy issues are referred to the Advice Branch of the Office of the General Counsel for initial disposition. N.L.R.B. Statements of Procedure, §101.8. In such cases, the General Counsel's decision to issue a complaint or dismiss the charge is explained in a written opinion referred to as an advice memorandum.

A Regional Director's refusal to issue an unfair labor practice complaint, whether pursuant to an advice memorandum or not, may be appealed by the charging party to the General Counsel's Office of Appeals. If the Regional Director is reversed, the General Counsel's decision is announced in a written opinion which also "sets forth the reasons why a complaint should issue...." (Pet.Br., p.8) The opinions issued in appeals cases are referred to as appeals memoranda. If the Regional Director's decision not to issue a complaint is sustained, no opinion is prepared. (Pet. Br., p.7)

proceedings on the Labor Act charge, Sears filed suit under the FOIA--naming as defendants both the National Labor Relations Board[3] and its General Counsel--and ultimately secured a court order directing the defendants to disclose and index all appeals and advice memoranda issued by the General Counsel since July 4, 1967, the effective date of the FOIA; to produce any documents incorporated by reference in said memoranda as well as any necessary explanatory material; and to cease his practice of deleting material (such as citations to prior cases) from disclosed advice and appeals memoranda without providing any written justification for the deletions, except that deletions of settlement instructions and names of affiants could continue to be made without written justification. 346 F.Supp. at 755; Pet. App. C, pp.9a-10a.[4] In its opinion, the District Court held that the requested memoranda were instructions affecting the public and final opinions required under 5 U.S.C. §§552(a)(2)(C) and (A), respectively, to be indexed and made available to the public, and that they were not internal memoranda exempt under §552(b)(5). Pet. App. C, pp. 7a and 9a. The court of appeals affirmed, without opinion, in a percuriam decision citing the district court's opinion and the

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3/ The General Counsel's motion to dismiss the Board as an improper party, based on the argument that the Office of the General Counsel is an independent agency, was denied.

4/ "Pet.App." refers to the appendix to the petition for writ of certiorari; "Pet. Br." to Brief for the Petitioners; "Op. App." to the appendix to the Brief for Respondents, and "A." to the separate appendix printed pursuant to Rule 36.

recent decision in Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710 (D.C.Cir. 1973), cert. granted, May 28, 1974, No. 73-1316, Pet. App. A., pp. 1a-2a. This Court has set Grumman for oral argument in tandem with the instant case.

STATEMENT OF THE CASE

Amici adopt as their own the detailed statement of the case presented in respondent's brief. Certain facts about the General Counsel's advice and appeals procedures are especially pertinent to the resolution of the legal issues in the instant FOIA case. Briefly summarized, those facts are:

> 1. Petitioners concede that the General Counsel is an independent agency possessing the unreviewable power to decide which unfair labor practice cases shall be heard by the National Labor Relations Board. 346 F.Supp. at 753, n.4; Pet. Br., p.3. As the threshhold decision-maker--the sentry at the Board's gates--the General Counsel wields enormous power to affect the direction of national labor policy.5/
>
> 2. In the interest of insuring the development of a uniform

5/ According to the National Labor Relations Board Report for the Fiscal Year Ended June 30, 1972, almost 87% of the Board's 25,555 closed cases were closed prior to the issuance of a complaint. Less than 6% of the total cases were closed after a Board or court decision.

prosecutorial policy,[6/] the General Counsel's Advice Branch disposes of all unfair labor practice charges involving novel or complex legal issues.

3. A Regional Director's refusal to issue a complaint, whether pursuant to an advice decision or not, may be appealed by the charging party to the

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6/ In testimony before the House Labor Subcommittee on June 29, 1961, the NLRB General Counsel presented the following explanation of the need for a centralized advisory function. (The testimony is reprinted at 1 CCH Labor Law Reporter, §1150.01.)

> Absent some kind of centralized advice section into which important novel and complex legal issues can be channeled, the risk of chaotic developments in the law would be marked. For, were Regional Directors left entirely free in this regard, each might proceed on his own view of a given legal question with the result that the law could, as a practical matter and before Board decision of the issue, be one thing in one Region and conflicting in others. Such a result would be at odds with the statutory purpose of encouraging stability in labor management relations. And the omission of selective control by the General Counsel, over these important cases would amount to a failure to exercise his statutory role in administering the law.
>
> Op App. at 7, emphasis added.

General Counsel's Office of Appeals.

4. Both advice and appeals cases are decided by an agenda consisting of staff and senior attorneys whose decision is either adopted, modified, or rejected by the General Counsel. Op. App. at 3-5, and 11-13.

5. In both advice and appeals cases, the General Counsel's final determination and his reasons therefor are routinely set forth in, respectively, advice memoranda and appeals memoranda.7/

6. The General Counsel's past practice was to withhold the texts of advice and appeals memoranda from the public. However, while the instant case was pending in the district court, the General Counsel announced he would disclose all advice and appeals memoranda in closed cases. Pet. Br., p.10, n.12.

7. A subject matter index to advice decisions was maintained by the General Counsel before the instant litigation began. A. 148-149; A. 42-44. It was not until after the instant litigation was filed however, that the General Counsel undertook voluntarily to prepare a similar subject matter

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7/ Appeals memoranda are issued only in cases reversing the Regional Director's decision to dismiss an unfair labor practice charge. See, note 1, supra.

index for appeals decisions. Brief for Appellant in the court of appeals, p.29, n.11. Indices to advice and appeals decisions in closed cases are also being made available to the public. A.42-44.

8. In the course of the agenda procedure, prior advice and appeals memoranda are reviewed and analyzed. Op. App. at 3-5, and 11-13. On occasion, the General Counsel cites and even attaches prior opinions to his final advice or appeals decisions. Pet. Br., pp.5-6. These written, indexed opinions do, therefore, have precedential significance in determining whether an unfair labor practice charge shall be dismissed or a complaint filed with the Board.

Summary of Argument

Amici argue that the advice and appeals decisions are "final opinions...and... orders made in the adjudication of cases," "statements of policy and interpretations which have been adopted by the...[General Counsel] and are not published in the Federal Register," and "instructions to staff that affect a member of the public," and that the requested documents are, therefore, required to be made publicly available under section (a)(2) of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(a)(2)(A), (B), and (C). In this connection, amici also argue that the General Counsel's opinions in advice and appeals cases may not be withheld under the FOIA's fifth exemption for "intra-agency memorandums...." 5 U.S.C. §552(b)(5)

Amici do not address petitioners' claim, raised for the first time in this Court, that the requested documents are also exempt under the second and seventh exemptions to the FOIA, 5 U.S.C. §552(b)(2) and (b)(7). We wish to point out only that allowing petitioners to make untimely exemption claims would be inconsistent with a recent line of cases holding that FOIA exemption justifications must be made with particularity and at a very early stage in the litigation. See, Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973), cert. den., 94 S.Ct. 1564 (1974); Cuneo v. Schlesinger, 484 F.2d 1086 (D.C.Cir. 1973); Pacific Architects and Engineers Incorporated v. Renegotiation Board, No. 73-2093 (D.C.Cir. decided October 8, 1974).

I. The General Counsel Is An Agency Subject to the Public Disclosure Requirements of the FOIA

The express requirement in section (a)(2) that certain information be made public and indexed applies to "(e)ach agency." "Agency" is defined in the Administrative Procedure Act, 5 U.S.C. §551(1) to mean, with certain enumerated exceptions not applicable here, "each authority of the Government of the United States, whether or not it is within or subject to review by another agency...." The General Counsel has conceded that "in the performance of his pre-complaint prosecutorial authority, he is clearly an agency within the meaning of 5 U.S.C. §551(1)." 346 F. Supp. at 753, n.4. Principally, his authority consists of the power to make final, unreviewable decisions as to whether unfair labor practice charges shall be presented to the Board. This statutory function clearly entails the exercise of "substantial independent authority." Soucie v. David, 448

F.2d 1067, 1073 (D.C.Cir. 1973). As a legal consequence of the General Counsel's status as an independent agency, it follows that if the disputed advice and appeals opinions fall within the categories of information specified in section (a)(2) of the FOIA, the General Counsel must index the documents and make them available to the public.

II. Advice and Appeals Memoranda Are Final Opinions and Orders

Section 552(a)(2)(A) requires that agencies index and make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." The district court held that advice memoranda are "instructions which affect a member of the public" within the meaning of section (a)(2)(C), and that appeals memoranda are "final opinions" within the meaning of section (a)(2)(A). The record, however, reveals no substantial difference between advice and appeals memoranda--indeed, petitioners characterize the two types of documents as "comparable." Pet. Br., p.8. Each is essentially an opinion setting forth the General Counsel's disposition of an unfair labor practice charge and his reasons therefor.[8/]

8/ Only a small percentage (an average of 10% in 1959 and 1960) of unfair labor practice charges filed with the Regional Directors are referred to the Advice Branch for initial decision. Op.App. 5. Of these, only those resulting in determinations that a complaint should not issue may be appealed. Thus, it is very rare that an unfair labor practice charge generates both an advice and an appeals memorandum. For purposes of the FOIA and the Administrative Procedure

The advice memorandum, as well as the appeals memorandum, "occupies the same opinion status as any document produced by a decision-maker in an adjudicatory-like process [here the Agenda procedure]..." Grumman v. Renegotiation Board, 482 F.2d 710, 713 (D.C.Cir. 1973).

Advice and appeals memoranda are the mechanisms the General Counsel uses to announce and explain final dispositions of requests by aggrieved parties that unfair labor practice complaints be filed with the Board. The General Counsel's final decisions in advice and appeals cases are recorded in written opinions which are being or will be indexed. In these opinions, the General Counsel discusses, distinguishes, repudiates, or follows the legal reasoning of prior decisions. In sum, the advice and appeals memoranda are formal statements of the law governing the General Counsel's disposition of unfair labor charges.

To the extent that advice and appeals opinions are withheld or not promptly disclosed, they constitute the kind of secret agency law Congress expressly sought to eradicate when it enacted the FOIA. See, e.g., Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); Tax Analysts and Advocates v. I.R.S., No. 73-1978 (D.C. Cir. 8/19/74); Davis, Admin. Law Tr. §§3A.9, .11, .12, .14, and .21 (1970 Supp.). In a

8/(con't.) Act, 5 U.S.C. §551 et seq., an advice opinion is "final" whether or not it could be reviewed by the Office of Appeals. See, alternative holdings in Grumman v. Renegotiation Board, 482 F.2d 710, 713 (D.C. Cir. 1973).

rare display of unanimity, the House and Senate committees gave virtually identical reasons for the requirement in section (a)(2) that agency opinions and orders not only be disclosed, but that they also be indexed.

> The indexing requirement will prevent a citizen from losing a controversy with an agency because of some obscure or hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way to discover it. H R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966).

> Requiring the agencies to keep a current index of their orders, opinions, etc., ...will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it. S.Rep. No. 813, 89th Cong., 1st Sess., 7 (1965) (hereinafter S.Rep.).

Although the General Counsel is indexing advice and appeals memoranda, he maintains that these written opinions may be kept secret indefinitely or, as is his current practice, until the underlying labor charge has been adjudicated by the Board.

Requiring agencies to make their law public serves several beneficial policies not the least of which is that persons are better able to conform their conduct to the requirements of the law as interpreted and applied by the agency. In this connection,

if complete information about an agency's past decisions is available, persons are in a much better position to predict what action the agency is likely to take in future cases. Furthermore, as the legislative history emphasizes, parties to agency proceedings must know what the agency's law is in order to present their cases most effectively. One final salutary effect of requiring disclosure of agency law is that the public is given an opportunity to examine the agency's decisions, thereby creating an incentive for the agency to be consistent and fair in its adjudications rather than arbitrary and capricious.

The General Counsel argues that advice and appeals memoranda are not "final opinions...and...orders, made in the adjudication of cases" because only the Board can adjudicate unfair labor practice cases. The General Counsel's contention that he does not adjudicate cases is both factually and legally unsupportable. As a factual matter, the General Counsel decides which unfair labor practice charges are meritorious and which shall be dismissed. Pet. Br., p.3. The General Counsel's decision to dismiss a charge or to file a complaint is as final and has as much impact on the parties as any determination the Board might subsequently make.9/ In effect, the General Counsel adjudicates all "cases" initiated

9/ The General Counsel's refusal to issue a complaint may not be reviewed by the Board nor, in general, by the courts. See, Balanyi v. Local 1031, Internat'l Bro. of Electrical Wkrs., 374 F.2d 723 (7th Cir. 1967). Furthermore, only a very small percentage of unfair labor charges result in complaints. See note 5, supra.

by an unfair labor practice charge, whereas the Board adjudicates only those "cases" initiated by a complaint filed by the General Counsel.

The agenda procedure[10/] the General Counsel follows in deciding advice and appeals cases is an adjudication under the Administrative Procedure Act, 5 U.S.C. §551. Section 2(d) of the APA defines "adjudication" to mean "agency process for the formulation of an order." 5 U.S.C. §551(7). "Order" is defined to mean "the whole or any part of a final disposition...of an agency in a matter other than rulemaking but including licensing." 5 U.S.C. §551(6). Nothing could be more final than the General Counsel's disposition of unfair labor charges; his decisions granting or denying access to the Board are unreviewable. Parties whose charges are dismissed have no further recourse; parties against whom complaints are filed have no alternative but to settle or defend themselves before the board.

All advice and appeals memoranda include final orders, i.e., they either grant or deny the charging party's request that the General Counsel file a complaint with the Board.

> An "order" may say no more than "application granted" or "appli- denied" but that much has to be open to public inspection;

10/ Op.App. at 3-5, and 11-13. An agenda is a group of staff and senior attorneys who prepare and recommend decisions in advice and appeals cases for the General Counsel.

> whether that much may be meaningful has to depend upon the application of the Information Act to the other papers in the case. Davis, Admin. Law Tr. §3A.8, at p. 128 (1970 Supp.).

The record in the instant case indicates that the General Counsel routinely makes prompt disclosure of the "order" portion of advice and appeals opinions. The disclosure is made in letters to the parties advising them of the outcome of advice and appeals proceedings.

But, advice and appeals memoranda are more than terse orders announcing the outcome of the General Counsel's final prosecutorial deliberations. They are also opinions setting forth the General Counsel's legal and policy rationales for his decision in the particular case. At present, however, the texts of advice and appeals memoranda are not promptly disclosed; these final opinions are withheld until the underlying unfair labor practice case is closed. Congress provided no exceptions to the broad requirement in section (a)(2)(A) that all agency opinions and orders be made public. Thus, this Court should hold that the General Counsel is required to disclose all advice and appeals memoranda whether or not the underlying unfair labor practice cases are pending before the Board. Grumman v. Renegotiation Board, supra; Davis, Admin. Law Tr. §§3A.8 and 3A.21 (1970 Supp); accord, American Mail Line Ltd. v. Gulick, 411 F.2d 696 (D.C.Cir. 1969); Sterling Drug, Inc. v. F.T.C., 450 F.2d 698, 708 (D.C.Cir. 1971).

III. Advice and Appeals Memoranda Are Not Intra-Agency Memoranda That May Be Withheld Under Exemption 5

The General Counsel's principal argument for withholding advice and appeals memoranda is that they are internal memoranda exempt from disclosure under the FOIA's fifth exemption, 5 U.S.C. §552(b)(5).11/ To bolster this argument, the General Counsel attempts to convey the impression that the advice and appeals opinions are nothing more than internal communications between attorneys investigating, evaluating, and discussing the prosecution of unfair labor practice charges. This characterization of the documents in issue, however, is simply erroneous. Advice and appeals memoranda are the "end product" of elaborate, hierarchical decision-making processes; these documents announce and explain the General Counsel's final decision as to whether he shall prosecute an unfair labor practice charge.

The General Counsel's fifth exemption argument has been made and rejected in several decided cases dealing with similar kinds of agency records. In holding that previously internal documents explaining

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11/ Respondent does not seek the predecisional memoranda prepared by the General Counsel or his staff in advice and appeals cases. If this Court holds, as *amici* contend, that advice and appeals opinions are required to be disclosed, the decision would have no effect on the General Counsel's discretionary authority to withhold all preliminary, deliberative memoranda prepared in the course of deciding advice and appeals cases.

the Federal Trade Commission's reasons for approving a merger were final opinions required to be disclosed, the court commented:

> ...(T)he policy of promoting the free flow of ideas within the agency does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Sterling Drug, Inc. v. F.T.C., supra, 450 F.2d at 708.

The court went one analytical step further in the Grumman case holding that decisions of the agency's Regional Boards were "final opinions," and that, by definition, "final opinions" could not be internal memoranda, that the two kinds of records are mutually exclusive categories under the FOIA.

> Exemption 5 is simply irrelevant to final agency opinions because such opinions are decisional documents rather than pre-decisional, consultative and deliberative inter- or intra-agency memoranda. Grumman v. Renegotiation Board, supra, 482 F.2d at 710.

The court insisted that the purely factual task of distinguishing between preliminary internal memoranda and final agency decisions was to be guided by a simple principle:

> ...(A) document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties should not be shielded from public disclosure on the ground that it was originally prepared for purposes of pre-decisional consultation, because the agency has customarily not disclosed the document, or because the agency labels the document other than what it really is. Id. at 721.

See also, American Mail Line Ltd. v. Gulick, supra (pre-decisional, staff memorandum expressly relied upon in a final agency decision not exempt from disclosure); Bristol-Myers Corp. v. F.T.C., 424 F.2d 935 (D.C.Cir. 1970), cert. den., 400 U.S. 824 (1970) (documents relied upon in agency rulemaking required to be disclosed); Vaughn v. Rosen, No. 1753-72 (D.D.C. 10/9/74) (slip. op. at 5-6) (Civil Service Commission's evaluations of agencies' personnel practices not exempt under the fifth exemption). The result in each of these cases is consistent with Professor Davis' suggested accommodation between the disclosure and indexing requirements of Section (a)(2) and the exemption for internal memoranda in section (b)(5):

> I think such an accommodation calls for disclosure of all "opinions and interpretations" which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining

> what its law shall be. The need for secret communication among officials within the government should be recognized, but so should the need to prohibiting all secret law. Davis, Admin. Law Tr. §3A.21, at p.159 (1970 Supp.).

The General Counsel attempts to minimize the significance of advice and appeals memoranda as records embodying his final opinions, interpretations, and statements of policy with the suggestion that these documents are larded with privileged trial preparation materials. In the future, there is no reason why the General Counsel could not publish his formal advice and appeals decision in one document, and his internal strategy advice in another. See, Grumman v. Renegotiation Board, 425 F.2d 578, 581 (D.C.Cir. 1970). Meanwhile, insofar as existing memoranda are concerned, the district court's order below takes cognizance of the problem by allowing the General Counsel to delete settlement suggestions and names of affiants.

The General Counsel also argues, somewhat obliquely, that the advice and appeals memoranda are not "final opinions" because he is not bound to rely upon them as precedent. Professor Davis anticipated this argument and disposed of it in the following manner:

> Some opinions may have little value, but I would prefer to have all of them available and indexed than to have agencies select the ones they believe to have precedential significance. A private party who wants to know the agency's law should be entitled

> to make his own determination of what precedents have value. Id., §3A.14 at p.140.

Notwithstanding the General Counsel's protestations to the contrary, the record does indicate that prior advice and appeals memoranda are studied when a new case comes up for decision, and that prior decisions are sometimes expressly relied upon as precedent. Pet.Br., p.5. This practice strongly suggests that advice and appeals memoranda do function as operative statements of law and policy followed by the General Counsel in carrying out his responsibilities under the Labor Act. As such, the advice and appeals memoranda are records of agency law required to be made public under section (a)(2) of the FOIA.

IV. Advice and Appeals Memoranda Are Statements of Policy and Interpretations

Although not considered by the courts below, advice and appeals memoranda, separately or in combination, are "statements of policy and interpretations which have been adopted by...[the General Counsel] and are not published in the Federal Register." 5 U.S.C. §552(a)(2)(B). In every such memorandum, the General Counsel at the very least interprets the applicability of the law to the available facts in a given case. As the General Counsel testified in 1961, "the Advice Branch...concerns itself with the interpretation and application of legal principles." Op.App. 3; emphasis added. Advice and appeals decisions are also used by the General Counsel to record and communicate major and minor changes in enforcement policy. In his 1961 congressional testimony, the General Counsel

indicated that the outcome of advice cases is often affected by policy considerations, e.g.:

> (t)he general policy of the Act;
>
> (t)he ascertainable purposes of the particular statutory sections involved in the case;
>
> (t)he time and circumstances under which the issue arises in relation to the developing Board law; (This may include seeking re-examination of prior Board decisions.) Op. App. 9.

Describing the procedure by which an appeal is decided, the General Counsel testified, "When a case...involves a policy issue,... the case is discussed in detail with the General Counsel...." Op. App. 13.

Thus, in addition to being final opinions and orders in individual cases, advice and appeals memoranda are also vehicles for transmitting statements describing the General Counsel's enforcement policies as well as his interpretations of the Labor Act. Since section (a)(2)(B) requires that statements of policy and interpretations adopted by an agency be disclosed to the public, advice and appeals memoranda may not be withheld.

V. Advice and Appeals Memoranda are Instructions to Staff That Affect Any Member of the Public

Although advice and appeals memoranda are not "administrative staff manuals," they do contain "instructions to staff that affect any member of the public."

5 U.S.C. §552(a)(2)(C). Advice memoranda instruct the Regional Director either to file a complaint or to issue a dismissal letter; appeals memoranda reverse the Regional Director's original refusal and direct him to file a complaint. The General Counsel strains to suggest that, in theory, the Regional Directors could disregard the basic instructions contained in advice memoranda. Pet.Br., p.6. However, after a "careful examination of the [advice] procedure," the district court found that the Regional Director must abide by the advice decision in every case:

> ...(T)he net effect of an Advice memorandum is to truncate the delegated authority of a Regional Director to the point where his issuance of a complaint or refusal to do so is merely a ministerial function. Far from being recommendations, although ancillary recommendations may be contained therein, Advice memoranda are instructions mandatory in substance if not in form. 346 F.Supp. at 753.

The instructional effect of an appeals decision is equally mandatory, a point the General Counsel does not dispute. "Upon receipt of...the appeals memorandum, the Regional Director, unless there is a settlement, issues a complaint." Pet.Br., p.8.

In regard to the district court's holding that advice memoranda are instructions to staff affecting a member of the public, the General Counsel argues that these instructions are exempt because they pertain to law enforcement matters rather than to administrative matters.

The Senate committee report gave the following reason for the addition of the word "administrative" to an earlier bill's provision that "staff manuals and instructions" be made available to the public:

> The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action. S.Rep. 2.

Three U.S. Courts of Appeals have decided that in adding the "administrative" limitation to the "staff manuals and instructions" disclosure mandate, Congress intended to except only that law enforcement information which, if disclosed, would make it possible for law violators to avoid apprehension or the imposition of sanctions. In contrast, law enforcement manuals and instructional materials that would assist lay members of the public in obeying the law were required to be disclosed.

> Law enforcement is the process by which a society secures compliance with its duly adopted rules. Enforcement is adversely affected only when information is made available which allows persons simultaneously to violate the law and to avoid detection. Information which merely enables an individual to conform

> his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure....
>
> Far from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law. Such clarifying information is found in agency rulings made public....It may be found in the criteria for investigative action; in standards for evaluation and so forth. Hawkes v. I.R.S., 467 F.2d 787, 795 (6th Cir. 1972) (footnote omitted); quoted with approval in Stokes v. Brennan 476 F.2d 699, 701-02 (5th Cir. 1972); accord, Davis Admin. Law. Tr. §3A.12, at p. 137 (1970 Supp.).

Most recently, the U.S. Court of Appeals for the District of Columbia Circuit, following a similar analysis, held that portions of the Defense Contract Agency Audit Manual containing "interpretations of rules and statutes or guidelines for allowability of costs" were required to be disclosed. Cuneo v. Schlesinger, 484 F.2d 1086, 1090-1091 (D.C.Cir. 1973).

Advice and appeals memoranda must be disclosed in order to provide an opportunity for "public examination of the basis for [the General Counsel's] administrative action" on unfair labor practice charges. S.Rep. 2. The disputed documents

do not contain the kind of law enforcement information that would help employers and unions circumvent their legal obligations under the Labor Act. On the contrary, advice and appeals memoranda contain the kind of information that would increase public understanding of the Labor Act's requirements, particularly as those requirements are interpreted and applied by the General Counsel.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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